The Central Law Journal.

ST. LOUIS, NOVEMBER 15, 1889.

IT may be as well for Missouri practitioners to note and study the enactments of the last legislature, which went into effect on the first of the current month. The changes made, especially in the matter of practice in civil cases, and the law pertaining to married women, are radical and sweeping. For the first time, in this State, a married woman, as regards her legal rights and privileges, is *sui juris*. The new act destroys the common law disability of coverture, with respect to her power to contract generally, and be sued in courts of law, and gives these courts jurisdiction to render personal judgments against her and power to satisfy them out of any property she may own, dispensing with the cumbersome machinery of a court of equity, which has heretofore been employed to enforce her liabilities. The changes in the practice act are many and important, especially that pertaining to appeals. The first volume of the revised statutes, published by authority of the general assembly, has just made its appearance. In all probability it will be some time before the second volume will be issued. This will be the cause of considable uncertainty and confusion, as under the declaratory act, the revised statutes of 1889, are now in operation. So far as the above changes are concerned, those interested will find on pages 13 and 32 of the current volume of the JOURNAL an accurate statement of the law.

THE report of the committee on Judicial Administration and Remedial Procedure, made at the last meeting of the Missouri Bar Association through its chairman, Mr. F. N. Judson, reviews in an interesting manner the various changes in the law of that State, and, very properly, calls attention to the fact, that nearly all of them have been made in pursuance of recommendations from that association, either formally made or suggested by its discussions. This report, among other things, calls attention to a singular lack of uniformity, apparently unintentional, among the different counties of the State, in the matter of the employment of official stenographers, their compensation and the use by litigants of their notes of testimony. From this statement, it would appear, that litigants in some counties have the privilege of using the stenographer's notes in the transcript for the appellate court, are entitled to have the amount of the stenographer's pay for his copy taxed as costs, are obliged to pay a stenographer's fee only when they use the stenographer; while in other counties the law is the reverse; and in the city of St. Louis much complaint is made because a litigant is obliged to pay a stenographer's fee in every case whether tried or not. In the latter case the question arises whether such an enforced payment by a litigant for services which he neither receives nor desires can be constitutionally defended.

A COMMITTEE of the American Bar Association has prepared, and sent to President Harrison a letter, requesting him, in his forthcoming message to congress, to call the attention of that body to the great need of legislation in the direction of relief of the supreme court docket. The letter will be found on page 394 of this issue. We print it in full, because it contains the clearest and most succinct statement of the condition of litigation in that court that we have seen, and forcibly impresses the reader with the serious character of the situation. The report of the committee accompanying it reveals, in an intelligible manner, the scope and effect of the legislation recommended by the association and places the scheme of an intermediate court of appeals in the best possible light. That some legislation on the subject is absolutely required there cannot be any contention, after reading the statistics collected in this letter, and it is sincerely to be hoped that congress will be moved to act promptly and effectively.

IN the current number of the Law Quarterly Review, Sir Frederick Pollock makes a vigorous attack upon the recent decision of the English House of Lords, in Peak v. Derry, noticed on page 122 of the current volume, and declares the law as there laid down to be bad.

The question was, in that case, as to how far a man may go in making a false statement of fact for his own advantage, without reasonable grounds for believing it to be true, and the court in reversing the case held the defendant not liable unless he knew he had no reasonable ground for believing his statement to be true. Lord Bramwell in his judgment ruled that it was not enough that the defendant had no reasonable ground for his belief, but that he must also know that he has no reasonable ground. There is a moral duty to tell the truth; but to be actionable a breach of that duty must be dishonest. Sir Frederick Pollock, suggests that there are many courts, administering the common law, which are not bound by the decisions of English courts, and claims that the grounds assigned in this case are erroneous in law and ought to be disregarded in every tribunal which is at liberty to disregard them. His objection seems to be, that the common law was ripe for a new development, and that, in cases where persons have an interest in making a statement, they should be held liable, in the event of its turning out to be untrue, whenever they have made it carelessly or without reasonable grounds. He insists that none of the authorities go so far as to hold that a man who takes it upon himself to make a positive assertion for his own advantage, intending others to rely upon it, can escape liability for damages, if it appears that his statement was false and that he has no reasonable ground to believe it to be true. There are some features of the House of Lords conclusion which are puzzling, to say the least. They hold in effect that a person makes a fraudulent statement when he makes a statement which he believes to be true, if he has no reasonable ground for his belief and if he, at the same time, knows that he has no reasonable grounds. But the question will naturally occur, if the person knows he has no reasonable ground to believe, how can he be said to believe? Is it possible for a man to believe what he knows there is good reason not to believe?

Though the precise question, involved in Peak v. Derry, does not seem to have arisen in this country we feel sure that the current of authority does not go beyond the limits of the doctrine laid down by Sir Frederick, and that, though the general rule is that false representations to be actionable must be dishonest, they are of that character, when made by one, for his own advantage, carelessly, or where he has no reasonable grounds for believing in their truth.

NOTES OF RECENT DECISIONS.

An extension of the rule rendering void a wagering contract or sale for future delivery was made in Harney v. Merrill by the Supreme Court of Massachusetts. There it was held that a contract providing that defendants should give orders to plaintiffs from time to time, to purchase and sell on the board of trade, in their own names, certain merchandise on account of defendants, and before the time of delivery to procure such purchases and sales to be set off against each other according to the usages of the board, defendants not to receive or deliver any merchandise, but only to pay to or receive from plaintiffs the differences between purchase and selling price, and plaintiffs to receive a certain margin and commission, is a wagering contract, and not only void as against public policy, though plaintiffs' purchases and sales in pursuance of such contract were legal, but such contract is illegal, and plaintiffs cannot recover commissions or money paid in settlement of differences between purchases and sales made in pursuance thereof. The court says:

The plaintiffs contend that, even if the contracts which the defendants authorized them to make and which they made on the board of trade had been wagering contracts, yet they could recover whatever money they had paid in settlement of these contracts in the manner authorized by the defendants. In Thacker v. Hardy, L. R. 4 Q. B. Div. 685, the court found that the plaintiff was employed to make contracts, and ruled that the understanding between the plaintiff and his customer, that the contract should be so managed that only differences in prices should be paid, did not violate the provisions of 8 & 9 Vict. ch. 109, § 18. Lindley, J., in giving the opinion at the trial, said: "What the plaintiff was employed to do was to buy and sell on the stock exchange, and this he did; and everything he did was perfectly legal, unless it was rendered illegal, as between the defendant and himself, by reason of the illegality of the object they had in view, or of the transaction in which they were engaged. Now, if gaming and wagering were illegal, I should be of opinion that the illegality of the transactions in which the plaintiff and the defendant were engaged would have tainted, as between themselves, whatever the plaintiff had done in furtherance of their illegal designs, and would have precluded him from claiming in a court of law any indemnity from

the defendant in respect of the liabilities he had incurred. Cannan v. Bryce, 3 Barn & Ald. 179; McKinnell v. Robinson, 3 Mees. & W. 434; Lyne v. Siesfield, 1 Hurl. & N. 278. But it has been held that, although gaming and wagering contracts cannot be enforced, they are not illegal. Fitch v. Jones, 5 El. & Bl. 238, is plain to that effect." On appeal, Brett, L. J., said: "It was further suggested in Cooper v. Neil that the agreement was that, although the plaintiff, being broker to the defendant, but contracting in his own person as principal, should enter into real bargains, yet the defendant should be called upon only to pay the loss if the market should be unfavorable, and should receive only the profit if it proved favorable; and that no further liability should accrue to the principal, whatever might become of the broker upon the stock exchange; so that, as regarded the real principal, the defendant in the action, it should be a mere gambling transaction. I then considered that a transaction of that kind might fall within the provisions of 8 & 9 Vict. 109, § 18, but I thought that there was no evidence of it. And with respect to the present action I say that there is no evidence that the bargain between the parties amounted to a transaction of that nature. I retract nothing from what I said in that case." In England, wagering contracts concerning stocks or merchandise are not void at common law, and all the judges in Thacker v. Hardy were of opinion that the facts in that case did not show that the transactions between the parties were in violation of the statute.

In Irwin v. Williar, 110 U. S. 496, 510, 4 Sup. Ct. Rep. 160, 166, the Supreme Court of the United States say of wagering contracts that "in England it is held that the contracts, although wagers, were not void at common law, and that the statute has not made them illegal, but only non-enforceable, (Thacker v. Hardy *ubi supra);* while generally, in this country, all wagering contracts are held to be illegal and void as against public policy. Dickson's Ex'r v. Thomas, 97 Pa. St. 278; Gregory v. Wendell, 40 Mich. 432; Lyon v. Culbertson, 83 Ill. 33; Melchert v. Telegragh Co., 3 McCrary, 521, 11 Fed. Rep. 193, and note; Barnard v. Backhous, 52 Wis. 593, 9 N. W. Rep. 595; Kingsbury v. Kirwan, 77 N. Y. 612; Story v. Salomon, 71 N. Y. 420; Love v. Harvey, 114 Mass. 80." That court also say (page 510, 110 U. S., and page 166, 4 Sup Ct. Rep.): "But we are also of the opinion that when the broker is privy to the unlawful designs of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction." This was decided in Embrey v. Jemison, 131 U. S. 336, 9 Sup. Ct. Rep. 776. See, also, Kahn v. Walton, 20 N. E. Rep. 203, (January 8, 1889, Sup. Ct. Ohio); Cothran v. Ellis, 125 Ill. 496, 16 N. E. Rep. 646; Fareira v. Gabell, 89 Pa. St. 89; Crawford v. Spencer, 92 Mo. 498, 4 S. W. Rep. 713; Lowry v. Dillman, 59 Wis. 197, 18 N. W. Rep. 4 Whitesides v. Hunt, 97 Ind. 191; Bank v. Packing Co., 66 Iowa, 44, 23 N. W. Rep. 255; Rumsey v. Berry, 65 Me. 570.

It is not denied that wagering contracts are void by the common law of Massachusetts, but it is argued that they are not illegal, and that, if one pays money in settlement of them at the request of another, he can recover it of the person at whose request he pays it. It is now settled here that contracts which are void at common law, because they are against policy, like contracts which are prohibited by statute, are illegal as well as void. They are prohibited by law, because they are considered vicious, and it is not necessary that a penalty be imposed in order to render them illegal. Bishop v. Palmer, 146 Mass. 469, 16 N. E. Rep. 299; Gibbs v. Gas Co., 130 U. S. 396, 9 Sup. Ct. Rep. 553. The weight of authority in this country is, we think, that brokers who knowingly make contracts that are void and illegal as against public policy, and advance money on account of them, at the request of their principals, cannot recover it or their commissions, and we are inclined to adopt this view of the law. Embrey v. Jemison, *ubi supra*, and the other cases last cited.

An interesting question in the law of rape came before the Supreme Court of Indiana in Murphy v. State, which overrules a previous decision of that court — Stephens v. State. In the Murphy case it was held that under the Indiana statute making the act of sexual intercourse with any female under the age of 12 years a crime, any touching of the person of a female under that age, with intent to have sexual intercourse with her, is an assault and battery with intent to commit rape, whether it be done against her will or not. The court says:

We are referred to the case of Stephens v. State, 107 Ind. 185, 8 N. E. Rep. 94, and it is correctly contended by counsel for the appliant that, under the law as ruled in that case, the judgment should be reversed, for the reason that there is not only a failure to prove that the appellant touched the person of Elsie Truitt on the occasion referred to, but, if there had been evidence tending in that direction, that there was an entire absence of evidence tending to show that the advances were resisted by the child, or that she was incapable of resisting. The rule, as laid down by the learned judge delivering the opinion, is to the effect that, to constitute an assault and battery with intent to commit a rape, the act must be accompanied with force and against the will of the female, without reference to her age. But we are not willing to adhere to that case. The statute having made the act of sexual intercourse with a female child under 12 years of age a crime, it must follow as a logical conclusion that the abuse of her person with a view to the accomplishment of that act constitutes an assault and battery with the entent to commit a rape, if sexual intercourse does not take place. If, under the law, a female under 12 years of age is incapable of giving her consent to the act of sexual intercourse, then she is equally incapable of consenting to all familiarity with her person, which necessarily precedes the consummation of the act. It was not the intention of the legislature that a female under 12 years of age, because of her tender years, should be protected from an accomplished act of seduction, but left entirely unprotected from all of the defiling acts of the seducer which lead up to her seduction. Whenever sexual intercouse is attempted with a female under 12 years of age, whether with or without her consent, there exists a felonious intent on the part of the male; and if the attempt miscarries, but in what is done there is a touching of the person of the female, it is an unlawful touching, in a rude and insolent manner, and constitutes an assault and battery, and, with the felonious

attempt which is present, it is an assault and battery with intent to commit a felony.

We cannot imagine how it is possible for one person to touch another, intending thereby to commit a felony, without the act of touching being rude, insolent, and unlawful. Section 1834, Rev. St. 1881, which reads as follows, strongly supports our conclusion: "Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, *or of an attempt to commit the offense.*" The italics are our own. If the rule as declared in the case of Stephens v. State, *supra*, is to be adhered to, then there can be a rape committed, but no criminal attempt to commit the crime, if the child is under 12 years of age, and does not resist, and thus an exception to this section of the statute is created, although it recognizes no exception. We refer to the following authorities, cited by counsel for the appellee, which we have examined, and find that they support the conclusion to which we have arrived. Hays v. People, 1 Hill, 351; People v. McDonald, 9 Mich. 149; People v. Crosswell, 13 Mich. 428; Stephen State, 11 Ga. 226; State v. Johnston, 76 N. C. 209; Com. v. Roosnell, 143 Mass. 32, 8 N. E. Rep. 747; Givens v. Com. 29 Grat. 830; State v. Cross, 12 Iowa, 66; State v. Dancy, 83 N. C. 608; People v. Mills, 17 Cal. 276; Lawrence v. Com., 30 Grat. 845; State v. McCaffrey, 63 Iowa, 479, 19 N. W. Rep. 331; State v. Tarr, 28 Iowa, 397; Cliver v. State, 45 N. J. Law, 46; McComas v. State, 11 Mo. 116. We take the following from the case of Campbell v. People, 34 Mich. 351: "The lesser offense or felonious assault is necessarily included in the offense of rape, the complete offense being an aggravation of the felonious assault."

A QUESTION as to the liability of directors of a corporation came before the Supreme Court of Texas in National Bank v. Texas Investment Co. There it was held that the directors of a company, holding property of an insolvent company in trust, who misapply such assets, are individually liable to the creditors of the insolvent company to the extent of the assets so misapplied. The court says:

We come next to the question of the effect of the alleged transfer of the property of the Texas Investment Company to the new corporation, known as the Texas Investment Company, Limited." It is alleged that the former company, being insolvent, transferred to the latter all its property, the latter agreeing, in consideration of the transfer, to pay the former's debts. That by such an agreement the Texas Investment Company, Limited, became bound to pay the debt of plaintiff, there can be no doubt. According to the rule in American courts, where one person for a valuable consideration agrees to pay a sum due from the second to the third, the third party can sue directly upon the promise. 2 Whart. Cont. § 785 *et seq.* But did the latter corporation take the property of the former, charged with a trust in favor of the former's creditors? In support of the affirmative of the proposition we are cited to the case of Wallis v. Beauchamp, 15 Tex. 304. There a father conveyed to his son certain property, upon consideration of the latter's promise to support his father and mother and pay his father's just debts. It was held a trust existed upon the property conveyed in favor of the father's creditors. While this may be good law as applied to the facts of that case, we do not think it can be affirmed as a general principle that when a party purchases personal property of another, and in consideration of the sale agrees to pay the latter's debts, a trust exists upon the property in favor of the creditor in the absence of an agreement to that effect. The doctrine is, however, reasserted in the case of Montgomery v. Culton, 18 Tex. 736. That was a case in which the holder of an allowed and approved claim against an estate brought suit against the heir, who had received the property at the hands of the executor, and had promised to hold him harmless against the debts of the estate. This statement is sufficient to show that the question was not necessarily involved in that case. But this is a case of a transfer by an insolvent corporation of all its property to another, which assumes to pay its debts. In Sawyer v. Hoag, 17 Wall. 620, Mr. Justice Miller says: "Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation; and when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen. The principle is fully asserted in two recent cases in this court, namely, Burke v. Smith, 16 Wall. 390, and in New Albany v. Burke, 11 Wall. 96." In Sanger v. Upton, 91 U. S. 60, Mr. Justice Swayne uses this language: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration, and without notice. It is publicly pledged to those who deal with the corporation for their security. Unpaid stock is as much a part of this pledge and as much a part of the assets of the company as the cash which has been paid in upon it." To the same effect are the following cases: Clapp v. Peterson, 104 Ill. 26; Hastings v. Drew, 76 N. Y. 9; Bartlett v. Drew, 57 N. Y. 587; Gill v. Balis, 72 Mo. 424. In the cases from which we have quoted, and in many of those cited, the effect was to recover of stockholders unpaid subscriptions upon stock or to recover property which had been withdrawn by stockholders in exchange for stock already paid. It cannot be claimed that the creditors have any lien upon the property of a solvent corporation which it disposes of in the usual course of its business; but when one corporation transfers all its assets to another corporation, and thus practically ceases to exist, without having paid its debts, the latter corporation takes the property subject to a lien in favor of the creditors of the old company. This doctrine is distinctly asserted in 1 Jones, Liens, § 85 *et seq.*, and is supported by the following cases: Brum v. Insurance Co., 16 Fed. Rep. 140; Insurance Co. v. Transportation Co., 13 Fed. Rep. 516; Harrison v. Railway Co., *Id.* 522; Heman v. Britton, 88 Mo. 549; Blair v.

Railway Co., 24 Fed. Rep. 148; Fogg v. Railroad Co., 17 Fed. Rep. 871. The principle seems to have been recognized, in part at least, in the old English case of Curson v. African Co., 1 Vern. 121, which is similar to the case under consideration.

THE doctrine as to contributory negligence is well stated by the Court of Appeals of Virginia in Richmond & D. R. R. Co. v. Pickleseimer, as follows:

Contributory negligence consists, in contemplation of law, in such acts or omissions on the part of the plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent acts of the defendant, are a proximate cause or occasion of the injury complained of. It is a general principle, firmly imbedded in the law, and conclusively settled, that such negligence will defeat a recovery. Beach, Contrib. Neg. 14. And in Railroad Co. v. Aspell, 23 Pa. St. 149, Black C. J., said: "It has been a rule of law from time immemorial, and it is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties. When it can be shown that it would not have happened except for the culpable negligence of the party injured, concurring with that of the other party no action can be maintained." And Mr. Beach, citing the case just referred to, says: "From Butterfield v. Forrester 11 East, 60, to the latest judgments of the appellate courts in every common-law jurisdiction, the rule is consistently and uniformly declared." Citing, in a note, a great number of authorities, and among them the leading English case of Tuff v. Warnman, 5 C. B. (N. S.) 573, and the decisions of this court in Railroad Co. v. Morris, 31 Grat. 200, and Same v. Anderson, *Id.* 812. See Beach, Contrib. Neg. 15, note 2. In the last-named case, Burks, J., fully and clearly stated the rule, with the qualification thereto, from Tuff v. Warman, *supra*, as follows: "It appears to us that the proper question for the jury in this case, and, indeed, in all others of the like kind, is whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution that but for such negligence or want of ordinary care and caution on his part, the mismisfortune would not have happend. In the first case the plaintiff would be entitled to recover; in the latter not; as, but for his own fault, the misfortune would not have happened." And then Judge Burks proceeded to state the qualification to the rule, as laid down by the English judge, as follows: "Mere negligence or want of ordinary care or caution would not however, disentitle him [the plaintiff) to recover, unless it were such that but for that negligence or want of ordinary care and caution the misfortune could not have happened; nor if the defendant might, by exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff." In Dun v. Railroad Co., 78 Va. 645, in an elaborate and well-considered opinion, after reviewing a great number of authorities bearing on the rule in question, and the qualifications thereof, Lacy, J., said: "The sole question for this court to decide in this case is whether a person who is injured by the negligence of another, not willful or intentional, can recover in an action therefor, when he, by his own negligence, proximately contributed to the injury, so that but for his co operating fault the injury would not have happened, except when the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences of such negligence." In the same case Judge Lacy also said: "That a person who, by his own default, has brought upon himself a loss or an injury, can claim no loss or compensation for it from another, is a principle of universal application; and it is equally true that if his imprudence or negligence has so materially contributed to the loss or the injury that but for such imprudence or negligence it would not have occurred, he can claim no recompense from another who has been instrumental in causing it, unless the latter, upon the discovery of the danger into which the party had brought himself by his own fault, could by the use of such diligence as the extent of the danger and the nature of the threatened injury required, have avoided the occurrence. If, in other words, the injury though inflicted by another, was unavoidable by the exercise of proper diligence, by reason of the situation of peril into which the party, by his own neglect, had placed himself, he must be considered as the party solely in fault, and as the author of his own misfortune;" citing Hutch. Carr. 502, 505. And in the same case, as well as in the case of Railroad Co. v. Anderson, *supra*, it was said: "If the injury which the plaintiff sustained was occasioned by the negligence of the defendant, and solely by such negligence, there can be no doubt of the plaintiff's right to recover damages for the injury. But if there was negligence on the part of the defendant, and also on the part of the plaintiff, and the negligence of the latter contributed to the injury, the right of recovery depends upon the circumstances."

THE question whether a court has jurisdiction or authority to inquire into the result of an election on a question of the issuance of bonds, was decided in the affirmative by the Supreme Court of California in Gibson v. Board. The court says:

It is said that there can be a contest in a court over the election to an office simply because the statute provides a procedure for such a contest; but that, as there is no such procedure provided for a contest about any other kind of election, and as the subject is in its nature beyond the cognizance of courts therefore there is no judicial jurisdiction of any kind to determine any question rising out of such election. If that position be correct, then its consequences are far reaching and alarming. In the present case the errors of the election officers were against the issue of the bonds, and the amount of the bonds were comparatively small. But a case entirely different from the one here presented might easily arise, involving interests of immense magnitude, and to such a case the same rule would have to be applied. Suppose that interested parties should successfully contrive to have presented to the people of a county or city a proposition to issue bonds for an unworthy purpose, and to a ruinous extent, and that, although the people really defeated the project at the polls, certain election officers, either through intentional fraud, or by a gross mistake, refused to return a large number of votes cast in the negative, so that the returns would show the proposition to have been carried, would there be no remedy,—no power to execute the real will of the

people? There certainly would be no such remedy in the hands of the supervisors; for they can only estimate the votes returned, and have no power to count the ballots. The will of the people, then can be carried out by the courts, with their power to compel evidence and thoroughly investigate, or not at all. Without discussing generally the wide subject of what "rights of persons" and "rights of things" may be enforced in courts by means of ordinary or extraordinary actions and proceedings therein, it is sufficient to say here that the constitution of the State (section 18, art. 11) has specifically provided for an election to determine the policy of creating a bounded indebtedness, and prohibited the issuance of bonds without the consent of two-thirds of the voters of the county; and that whenever there is such a constitutional provision, and no machinery provided by law for enforcing it, the constitution, by necessary implication, confers upon the court of chancery jurisdiction to protect and enforce the will of the people by suitable and proper procedure. This principle has been declared and followed in numerous cases where constitutions have provided for the removal of county-seats, and we see no distinction, with respect to the point under discussion, between those cases and the one at bar. In Boren v. Smith, 47 Ill. 482, which involved an election for a county-seat, and where the jurisdiction of the supreme court was attacked, the supreme court of Illinois says: "Our constitution has declared that such a vote shall be taken before a county-seat can be removed; and in making that provision it is manifest that it was designed that the will of the majority of the legal voters of the county should control. It would defeat that object, and render this fundamental provision inoperative, if the sense of the majority of the legal voters, constitutionally expressed, might be overcome by illegal voters or other fraudulent means; and, as the constitution and the law have failed to afford a specific remedy to prevent this provision from being defeated it is eminently proper that equity should afford the requisite relief in such cases. As there is no law in England similar to this provision of our constitution, and the organic laws of other States are believed to have no such provision, it is not to be expected that precedents may be found upon which to base the jurisdiction of a court of equity. But if our courts of equity were, in the absence of legislative action to refuse relief, this constitutional provision could, by fraud, be rendered inoperative, and wholly defeated. The decree of the court below is affirmed." In People v. Wiant, 48 Ill. 263, the court also says: "In this case the law has provided no means of contesting the election, or correcting the vote then given; and if frauds were committed, and the returns do not, for that reason, show what was the expressed will of the voters of the county, the design of the law, and the intention and desire of the majority of the county, would be defeated, unless the courts can afford a remedy. This is a case unlike a mere contest of two individuals as to which shall exercise the powers and perform the duties of an office. In that case the individuals are immediately interested, and the public remotely; but in this case it is a matter of public concern to the people of the county. In that the law has afforded an ample remedy, by conforming to the statute authorizing them to contest the election, to determine which is entitled to the office; while in this, no means are provided by the statute for carrying into effect the will of the majority under the law, when apparently thwarted by fraud, accident, or mistake. Hence the necessity of equity to entertain jurisdiction and afford relief." And in Dickey v. Reed, 78 Ill. 262, it is said: "Where courts of equity in this State have taken jurisdiction of contested county-seat election cases, it has been upon the express ground that the constitution had provided that county-seats should not be removed, except upon a vote of a majority in favor of removal, and that the legislature, in providing for such elections, failed to provide any means of contesting them; and to protect the rights of the majority intended to be secured to them, it was held that the fundamental law, by implication, conferred the power on courts of chancery to hear and determine such cases." Numerous other authorities could be cited from sister States; but the point has been practically decided by this court. Calaveras Co. v. Brockway, 30 Cal. 325, was a contest over an election for a county-seat. The court took jurisdiction of the case, and held that "the derermination of the board of supervisors that a place voted for received a majority of the votes cast at a special election for a county-seat is *prima facie* evidence of the fact so determined, but is not conclusive; and, if the fact was not as determined, it may be attacked for fraud or mistake, and the true result ascertained." As before stated, we see no difference in principle between an election to determine a county-seat and an election to determine whether a bonded indebtedness shall be increased; and in our opinion the court below had jurisdiction of the subject of the action in the case at bar.

A QUESTION, upon which authorities are conflicting, as to the power of a court of equity to compel a husband to support his family, came before the Supreme Court of Nebraska in Earle v. Earle. There it was held that courts of general equity and common law jurisdiction are not necessarily limited in the exercise of such jurisdition to the provisions of the statutes. The law of the land having made it the legal duty of a husband to support his wife and children, courts of equity have the power, in a suit by the wife for alimony and support, to enforce the discharge of such duty, without reference to whether the action is for a divorce or not. The court says:

It is a well-established rule of law that it is the duty of the husband to provide his family with support and means of living,—the style of support requisite, lodging, food, clothing, etc., to be such as fit his means, position, and station in life; and for this purpose the wife has generally the right to use his credit for the purchase of necessaries. At common law, where the husband heedlessly and wantonly, and from improper motives, refused a wife the necessary comforts of life, and refused to provide for her, a criminal prosecution, with recognizance, was sometimes resorted to for the purpose of compelling a competent husband to support his family. Schouler, Husb. & Wife, § 66.

It is the common expression of all writers found in the text-books that there is no wrong without some remedy. Now, if the allegations of the petition are true, which the demurrer admits, there is evidently a wrong. The question is whether or not the plaintiff shall be compelled to resort to a proceeding for a divorce, which she does not desire to do, and which probably she is unwilling to do, from conscientious

convictions, or in failing to do so she shall be deprived of that support which her husband is bound to give her. The authority or jurisdiction to grant divorces was exercised in England by the ecclesiastical courts, which have never existed in this country, and therefore no court has such jurisdiction here except by statute. But the authority to grant alimony grows out of the equity powers of the court. While the statute books of this and other States amply provide for the granting of divorces in meritorious cases, yet we do not apprehend that it is the purpose of the law to compel a wife, when the aggrieved party, to resort to this proceeding, and thus liberate her husband from all obligations to her in order that the rights which the law gives her, by reason of her marital relation with the husband, may be enforced. Such a conclusion would not generally strike the conscience of a court of equity as being entirely equitable.

In Butler v. Butler, 4 Litt. (Ky.) 202, the court said: "It is clear that strong moral obligation must lie on every husband who has abandoned his wife to support her. The marriage contract, and every principle, binds him to do this. To fail to do it is a wrong, acknowledged at common law, though the law knows no remedy, because there the wife cannot sue the husband; but in equity the wife can sue the husband, and it is the province of a court of equity to afford remedy where conscience and law acknowledges a right, but knows no remedy. Why, then, should the chancellor shrink at this case and refuse a remedy?"

In Galland v. Galland, 38 Cal. 265, this rule was followed, but by a divided court. From the syllabus in that case we quote the following: "The provision for alimony made in the statute concerning divorces was not intended to be a prohibition to the granting of alimony in other cases. The power to decree alimony falls within the general powers of a court of equity, and exists independent of statutory authority; and, in the exercise of this original and inherent power, a court of equity will, in a proper case, decree alimony to the wife in an action which has no reference to a divorce or separation."

In Garland v. Garland, 50 Miss. 694, in which there is a pretty general review of the cases, the court says: "Courts of equity in America will always interpose to redress wrongs when the complainant is without full, adequate, and complete remedy at law. Here there is no such process as *supplicavit*, nor a distinct proceeding for the restitution of the conjugal relation. If a wife is abandoned by her husband, without means of support, a bill in equity will lie to compel the husband to support the wife without asking for a decree of divorce." See, also, Almond v. Almond, 4 Rand. (Va.) 662; Purcell v. Purcell, 4 Hen. & M. 507; Jelineau v. Jelineau, 2 Desaus. Eq. 45; Prince v. Prince, 1 Rich. Eq. 282; Graves v. Graves, 36 Iowa, 310; 2 Bish. Mar. & Div. § 354 et seq.; Glover v. Glover, 16 Ala. 440; Wray v. Wray, 33 Ala. 187.

The cases cited in defendant's brief show that the States of Indiana, New Hampshire, Missouri, New York, Massachusetts, New Jersey, Michigan, and Louisiana, have heed for the opposite doctrine. There being this conflict in the decisions of the courts, it becomes the duty of this court to decide the case upon what may be deemed the soundest principles, and the most in consonance with the spirit of the present civilization and of our law. As we have already said, in substance, there is not much to commend an alleged principle of equity which would hold that the wife, with her family of one or more children to support, must be driven to going into court for a divorce when such a proceeding is abhorrent to her, or, in case of her refusal so to do, being compelled to submit to a deprivation of the rights which equity and humanity clearly give her; that, in order to obtain that to which she is clearly entitled, she must institute her action for a divorce, make her grievances public, which she would otherwise prefer to keep to herself, and finally liberate a husband from an obligation of which he is already tired, but from which he is not entitled to be relieved. It seems to us that a declaration of such a doctrine as the law of the land would place it within the power of every man, who, unrestrained by conscience, seeks to be freed from his obligations to his wife and family, by withholding the necessary comforts and support due them, to compel her to do that for him which the law would not do upon his own application.

DUTY OF PROSECUTOR TO PROVE THE RES GESTAE.

In criminal cases the State's attorney is supposed to be, and should be, wholly without bias or prejudice. His sole aim should be to see that strict and impartial justice is done between the State and the defendant. He should not seek, nor should he be allowed to take, any unfair advantage of the accused. As a general rule the advantage is all with the prosecution, and the prosecuting officer should not suffer himself to become imbued with any of the bitterness and malevolence of the private prosecutor; he should not become his *alter ego*, but should endeavor to see that the law is administered in its purity and simplicity. He represents all the people of the State, and he, therefore, represents to some slight extent the defendant also. If he suffers himself to exhibit a spirit of vindictiveness and malice, the jury will certainly imbibe some of it from him, and to some extent at least their verdict will be contolled thereby, and that safeguard, the presumption of innocence, which should attend every defendant down to the very moment when a verdict of guilty is rendered, will be overbalanced and outweighed by prejudice and passion.

In a civil action, it is to be expected that the attorney will be affected and, to some extent, contolled by the anxious spirit manifested by his client, feel that his client is right and the opposing party in the wrong, that the witnesses, with whom he has talked and who testify on behalf of his client, tell the truth, the whole truth and nothing but the truth, and that those who testify on the

other side are wanting in good faith and integrity, and testify only to those things which are favorable to the party who has them supœnæd. He is expected to look after and take advantage of every technical point that favors his view of the case and exclude from the jury all evidence brought forward by the other side that he can; he is also expected to suppress, or keep silent with regard to any evidence that may come to his knowledge, the production of which would prejudice his client's case; but such is not the duty of a prosecuting officer, nor should such be his object or aim.

In a criminal trial life or liberty and reputation are at stake. The State does not desire that the life or liberty of any citizen should be sacrificed through a technicality or for the purpose of advancing the interests and enhancing the popularity of the person who may happen to represent it on the trial. The aim of the law is that justice be administered, that the rights of the defendant on trial, as well as the rights of the public, be strictly guarded and not that private malice be gratified and private revenge be taken under color of law.

If the foregoing be true, it is then the duty of the attorney for the State to introduce all of the evidence tending to establish the actual facts of the transaction of which he may be cognizant, whether the same tend to the conviction or acquittal of the dendant, provided the witnesses be not too numerous. No part of the *res gestæ* should be withheld or suppressed for the reason that it militates against the theory of the prosecution and is favorable to the defendant. The defendant is entitled by law to a fair and impartial trial, and, if the prosecuting attorney has permitted himself to become embittered against the accused to such an extent as that he will withhold testimony which might turn the scales of justice in his favor, how can it be claimed that justice has been administered and the defendant fairly tried?

A party, whose passions and prejudices have been aroused against the defendant may be a witness for the State, and may communicate to its attorney certain facts, known only to himself, which would weigh heavily in favor of the defendant, but of which the defendant does not know that such witness has any knowledge, should the prosecuting attorney be permitted to suppress this testimony and thereby hang, or send to the penitentiary, an innocent man,—one whom any jury would acquit if the evidence was before it?

The answer to this would seem to be that no man, and especially no person holding an official position, should be permitted to traffic in human life or liberty, and, by pandering to the passions of the populace, rise upon the turbulent wave of prejudice to place and power, and thus reach the object of his ambitious aspirations; but he should see that the law be administered without fear, favor or partiality.

Take, for instance, a case like this: A man is on trial; the crime charged is murder in the first degree; the evidence shows beyond a reasonable doubt that he shot and killed the deceased, but the defendant claims that he killed him in self-defense; there is evidence of threats made by the deceased against the defendant and some evidence tending to show that, immediately before the defendant fired the fatal shot, the deceased had thrown his hand back toward his pistol pocket as if to draw a weapon and the defendant testifies that the deceased had actually drawn a pistol from his pocket before he fired; there is also evidence that several persons reached the spot almost immediately after the deceased fell, and that, after a careful examination, no pistol or weapon of any kind was found on or near the deceased; the whole transaction took place in a small room in the rear of a store, after dark, and the only light which reached said room came from lamps in the store. Before the trial the prosecuting attorney is informed that a certain person (who was a particular friend of the deceased and refuses to communicate his knowledge to the defendant or his friends) saw a particular friend of the deceased, almost immediately after the homicide, slip up to the deceased and, after feeling around on the floor where he lay, pick up a pistol, put it in his pocket and sneak away.

What would be the duty of the State's attorney under such circumstances? Should he suppress this evidence and thereby, in all probability, condemn the defendant to an ignominious death? Should he communicate the information thus acquired to the judge

and abide his decision? or, should he call and examine the witness, give the defendant the benefit of his testimony and thereby secure him a fair and impartial trial? Would it be proper for him to communicate the information to the defendant or his attorney, and would he, by thus making such facts known, be guilty of any breach of duty to the State, or any violation of his oath of office? Would he not, by their suppression, prove recreant to every better principle of human nature and act directly counter to the dictates of his conscience? Would he not also, in the event the defendant should be convicted and executed, be accessary to his death, and, in reality, guilty of murder?

But these are abstract questions with which it is not now necessary to deal. The question, however, which is of practical, and sometimes of vital, importance, is: Is it the duty of the State to prove the *res gestæ*, all the facts and circumstances surrounding the homicide? or, will the prosecution be permitted to lay before the jury only such portions of them as may tend most strongly to prove the guilt of the prisoner?

Every citizen, from the highest to the lowest, the most honored to the vilest and most degraded, is entitled to equal protection under the law, and the same strict and impartial justice that is meted out to the one should be measured to the other. No man should be tried and convicted when the State has the power to produce evidence that would show the defendant to be innocent or justifiable. In fact it is generally conceded that it is better that ninety and nine guilty persons should escape punishment for their crimes than that one innocent man should suffer; and, beyond all question, it is safer to err on the side of mercy than on the side of justice.

In Hurd v. People,[1] the court says: "But the prosecution can never, in a criminal case, properly claim a conviction upon evidence, which expressly or by implication shows but a part of the *res gestæ*, or whole transaction, if it appear that the evidence of the rest of the transaction is attainable. This would be to deprive the defendant of the presumption of innocence, and throw upon him the burden of proving his innocence. It is the *res gestæ*, or whole transaction, the burden of proving which rests upon the prosecution, so far, at least, as the evidence is attainable. It is that which constitutes the prosecutor's case, and as to which the defendant has the right of cross-examination; it is that which the jury are entitled to have before them, and, until this is shown, it is difficult to see how any legitimate inference of guilt, or the degree of the offense, can be drawn. The prosecution, in a criminal case, is not at liberty, like a plaintiff in a civil case, to select a part of an entire transaction which makes against the defendant, and then to put the defendant to the proof of the other part; so long as it appears at all probable, from the evidence, that there may be any other part of the transaction undisclosed, especially if it appears to the court that the evidence of the other portion is attainable. The only legitimate object of the prosecution is to show the whole transaction as it was, whether its tendency be to establish guilt or innocence. The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent—his object, like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success; and, however strong may be his belief of the prisoner's guilt, he must remember, that though unfairness may happen to result in doing justice to the prisoner in the particular

[1] 25 Mich., 406; Horrigan & Thompson's Cases on Self-defense, 849. In Marshall v. State 5 Tex. App. 273, the court says: "A prosecuting officer in behalf of the State, in his zeal for a conviction, should never overlook the fact that the interests of society and the vindication of the law require at his hands as much the protection of the innocent as the conviction of the guilty." In People v. Lee Chuck (Cal.), 20 Pac. Rep. 223, the court in commenting upon the action of the district attorney at the trial says: "We have been called upon many times to caution, sometimes to rebuke prosecting officers for the overzealous performance of their duties. They seem to forget that it is their sworn duty to see that the defendant has a fair and impartial trial, and that he be not convicted except by competent and legitimate evidence. Equally with the court, the district attorney, as the representative of law and justice, should be fair and impartial. He should remember that it is not his sole duty to convict and that to use his official position to obtain a verdict by illegitimate and unfair means is to bring his office and the courts into distrust. We make due allowance for the zeal which is the natural result of such a legal battle as this and for the desire of every lawyer to win his case, but these should be overcome by the conscientious desire of a sworn officer of the court to do his duty and not go beyond it." And see State v. Magoon, 50 Vt. 338.

case, yet that justice so attained is unjust and dangerous to the whole community; and, according to the well-established rules of the English courts, all the witnesses present at the transaction should be called by the prosecution before the prisoner is put to his defense, if such witnesses be present or clearly attainable. See Maher v. The People, 10 Mich., 225, 226. The English rule goes so far as to require the prosecution to produce all present at the transaction, though they may be the near relatives of the prisoner. See Chapman's case, 8 C. & P., 559; Orchard's case, *Ib.*, (note); Roscoe's Cr. Ev., 164. Doubtless, where the number present has been very great, the production of a part of them might be dispensed with, after so many had been sworn as to lead to the inference that the rest would be merely cumulative, and there is no ground to suspect an intent to conceal a part of the transaction. Whether the rule should be enforced in all cases, where those not called are near relatives of the prisoner, or some other special cause for not calling exists, we need not determine; but, certainly, if the facts stated by those who are called show *prima facie*, or even probable reason for believing, that there are other parts of the transaction to which they have not testified, and which are likely to be known by other witnesses, present at the transaction, then such other witnesses should be called by the prosecution, if attainable, however nearly related to the prisoner. But though no objection seems to have been made on the trial we allude to this subject for the purpose of calling attention to the evident disregard, on the trial of this case, of the rule there laid down in People v. Maher above cited. According to the rule there laid down, and from which we see no reason to depart, the prosecution should have been put to call Jerome Evans, at least, who was present at the first assault, and took part in stopping the affray, as shown by the witness Dow, on the part of the prosecution. In the very nature of the case, he was the people's witness, and should have been called by them, he being, as is evident, attainable, and subsequently sworn for the defendant, and it appeared from his testimony that he heard the conversation leading to the first assault, at an earlier stage than Dow, and no relationship to, or complicity with the defendant being shown or pretended."

In the case of Maher v. People,[2] the defendant was charged with an assault with intent to kill and murder one Patrick Hunt. The evidence on the part of the prosecution was that the prisoner entered the saloon of one Michael Folev, in the village of Houghton, where said Hunt was standing with several other persons; that prisoner entered by a back door and by a back way leading to it, in his shirt-sleeves, in a state of great excitement; that being asked if he had been at work, he said he had been across the lake; that on entering the saloon he passed nearly through it to where said Hunt was standing, and on his way towards Hunt, said something, but it did not appear what, or to whom; that as soon as the prisoner came up to where Hunt was standing, he fired a pistol at Hunt, the charge from which took effect in the head of Hunt; that immediately after the firing of the pistol the prisoner left the saloon, nothing being said by Hunt or the prisoner.

The prisoner offered evidence tending to show an adulterous intercourse between his wife and Hunt on the morning of the assault, and within less than half an hour previous thereto; that the prisoner saw them going into the woods together about half an hour before the assault; that on their coming out of the woods the prisoner followed them immediately and went after Hunt into the saloon, where, on his arrival, the assault was committed; that the prisoner, on his way to the saloon a few minutes before entering it, met a friend who informed him that said Hunt and his wife had had sexual intercourse the day before in the woods. This evidence was rejected by the court and the prisoner saved exceptions. Christiancy, J., delivered the opinion of the supreme court, and held that the evidence was competent and should have been admitted as part of the *res gestæ*. He said: "The circumstances which in fact, led to the assault were a part of the *res gestæ*, which the jury were entitled to have before them, to show the real nature of the act, the *quo animo*, the state of mind and intention, with which it was done. The object of the trial should be to show the real nature of the whole transaction, whether its tendency may be to establish guilt or innocence; but, until

[2] 10 Mich., 225.

the whole is shown which might have any bearing one way or the other, its tendency to establish one or the other cannot be known. An inference drawn from a detached part of one entire transaction way be entirely false. And, for myself, I am inclined to the opinion that all the facts constituting the *res gestæ*, so far as the prosecuting counsel is informed of, and has the means of proving them, should, on principle and in fairness to the prisoner, be laid before the jury by the prosecution. They naturally constitute the prosecutor's case. And whenever it may appear evident to the court, that but a part of the facts, or a single fact, has been designedly selected by the prosecution from the series constituting the *res gestæ*, or entire transaction, and that the evidence of the others is within the power of the prosecutor, it would, I think, be the duty of the court to require the prosecutor to show the transaction as a whole. Until this is done it is difficult to see how any legitimate inference of guilt, or of the degree of the offense, can be drawn; as every reasonable hypothesis of innocence, or a lower degree of guilt, is not, it seems to me, excluded. Criminal prosecutions do not stand on the same ground, in this respect, as civil cases. In the latter no such presumption is to be overcome; nor is it necessary to exclude every other hypothesis than the one sought to be established: 3 Greenl. on Ev., Sec., 29."

In the case of Wellar v. People,[3] the court say: "But where there is no doubt or dispute as to the fact of presence, the only objection will be that the witness may not be favorable to the prosecution. But this is no answer, any more than it would be if a subscribing witness stood in a similar position. As explained in Hurd v. People, 25 Mich., 406, and in the English cases there referred to, a public prosecutor is not a plaintiff's attorney, but a sworn minister of justice, as much bound to protect the innocent as to pursue the guilty, and he has no right to suppress testimony. The fact that he is compelled to call these witnesses, when he may not always find them disposed to frankness, entitles him, when it appears necessary, to press them with searching questions. Reg. v. Pratt, 8 C. & P., 745; Reg. v. Chapman, 8 *Id.*, 558. By this means and by laying all the facts before the jury, they are quite as likely to get at the truth as if he were allowed to impeach the witnesses who disappoint him. Any intelligent jury will readily discover whether a witness whom the prosecutor has been compelled to call is fair or adverse, and can make all proper allowance for bias, or any other influence which may affect his credit. If there is but a single eye-witness he could not be impeached, and yet the danger of falsehood is quite as great, and the chances of its correction much less than where there are two, and both are called. And if such a witness need not be called by the prosecution, the defense cannot impeach him, and must either call him, and run the risk of finding him against them, or, if they fail to call him, be prejudiced by the argument that they have omitted to prove what was in their power, and must have done so because they dared not call out the facts. There is no fairness in such a practice, and a prosecutor should not be permitted to resort to it. He is not responsible for the shortcomings of his witnesses, and he is responsible for any obstacle thrown in the way of eliciting all the facts."

In Territory v. Hanna,[4] the defendant was indicted for the murder of Nelson and convicted of murder in the first degree. In his opening statement to the jury the prosecuting attorney said: "that at the time of the homicide, nobody was there but the deceased, his wife and children." The prosecutor then produced testimony tending to show threats by the defendant to kill the deceased, and rested his case without producing any testimony as to what took place at the killing. The defendant moved the court that the prosecution be required to call Hannah Nelson, the wife of the deceased, but this motion was overruled by the court. The defendant appealed. The court reviewed some of the cases hereinbefore referred to and said: "The statement of the prosecuting attorney, in opening the case to the jury in the presence of the court, is an official statement made under the solemnity of his official oath. In this statement the prosecuting attorney declared to the jury that Hannah Nelson, the wife of the deceased, was present at this homicide. The testimony on the part of the prosecution also showed that she

[3] 30 Mich., 22.

[4] 5 Pac. Rep. 252.

was in a room adjoining that in which the homicide took place, immediately thereafter. Having stated officially to the court and jury that she was present at the homicide, and the proof showing that she was present immediately thereafter, and in all probability at the very act itself, the prosecuting attorney ought to have called this witness, or made some satisfactory explanation to the court why he did not, otherwise a suggestion is raised that there was design and purpose in omitting to call the witness. Especially should she have been called as there was no proof of the circumstances attending the killing in evidence at the time the motion was made." The judgment was reversed and a new trial ordered.[5]

In the case of Kent v. People, the court, taking a somewhat different view of the question, say: "It is but fair to the jury, upon whom is cast the grave responsibility of determining the prisoner's guilt, as well as his fate in respect to life and liberty, that all the facts comprising the *res gestæ* should be spread before them; and when we consider that every man is presumed to be innocent until his guilt is made to appear beyond a reasonable doubt, and that the burden of proof to this extent rests upon the State, it is but fair to the prisoner that the whole transaction, and not a select part of it, should be before the jury to be considered by them as the evidence in the case, and not as the evidence of contending parties in the case. Criminal prosecutions are not to be regarded or conducted as contests between individuals respecting civil rights, wherein advantages not reaching to the merits may be gained by one party over another. The policy of the government is to punish only those who violate the law, and to protect the innocent in all cases. Usually the character of the crime is demonstrated by the same evidence which establishes it; and if the accused is compelled to give in evidence some of the attending circumstances, the same rule should be applied as if the whole had been frankly presented by the State. It may therefore be laid down as the established doctrine of this State that, as to all facts in evidence properly constituting part of the *res gestæ*, they are to be considered by the jury, in passing upon the question of guilt or innocence, without discrimination as to the rules of evidence, whether introduced by the prosecution or the defendant."[6]

In the case of the State v. Porter[7] the Supreme Court of Iowa say: "Whether or not a homicide is committed in self-defense depends upon the circumstances under which the act is done. And these circumstances, whether introduced by the State, in making out the case in chief, or by the defendant in support of his defense, constitute part of the *res gestæ*. If they do not, they are not admissible in evidence. And, however the circumstances are introduced, the rule of law is, that the jury, after weighing them all, must be satisfied of the defendant's guilt beyond a reasonable doubt, or they must acquit."

This sounds well as a theory, but every lawyer who has had any experience in criminal practice, knows that whenever the evidence introduced on the part of the defendant conflicts with, or is inconsistent with, the evidence of the State as to the *res gestæ*, the jury, in almost every instance, will give greater credence to the State's witnesses. Therefore the State ought always to be required to prove the whole transaction, all of the circumstances surrounding the alleged criminal act.

This is a question of importance, and these suggestions are ventured with the hope that some one, who has given the matter consideration, will give us the benefit of his study.

D. R. N. BLACKBURN.

Albany, Or.

[5] This case is also reported in 5 Montana, 248.

[6] 9 Pac. Rep. 863; 8 Colo., 563. (1886.)

[7] 34 Iowa, 141.

BILLS AND NOTES — AGENCY — SIGNATURE.

LIEBSCHER V. KRAUS.

Supreme Court of Wisconsin, September 24, 1889.

A note, reading we promise to pay, signed with the name of a corporation, followed by A. B. president, is the note of the corporation alone and parol testimony is inadmissible to explain it.

ORTON, J.: This action is brought on the following promissory note:

"$637.40. Milwaukee, January 1st, 1887.

"Ninety days after date we promise to pay to Leo Liebscher, or order, the sum of six hundred

and thirty-seven dollars and forty cents, value received. [Signed] San Pedro Mining and Milling Company. F. Kraus, President."

The plaintiff demands payment on this note against both the corporation and Frederick Kraus, as joint makers. The defendant Kraus answered that he signed the note for the said San Pedro Mining & Milling Company, as its president, and not otherwise, and that his signature was placed upon said note for the purpose of showing who executed the same on behalf of said company, and as a part of the corporation signature to the note, and for no other purpose. The plaintiff offered to prove on the trial, substantially, that Kraus did not sign the name of the company, but signed his own name as a joint maker, intending to bind himself, and that this was according to the understanding of the parties at the time. This offer was rejected, and a verdict in favor of Kraus was directed by the court. This evidence is admissible only on the ground that there is an ambiguity in the signatures to the note. If, in the law, this signing imports that both the company and Kraus are jointly bound, or that only the company is bound, there is no ambiguity, and parol evidence to alter or vary this effect is inadmissible. But if, in the law, such signing imports only that both are bound, or the company only is bound, according to the facts and circumstances in explanation of it, and the intention or understanding of the parties, then there is an ambiguity, and the evidence was proper.

The contention of the learned counsel of the appellant that this signing imports that both are bound is inconsistent with the offer of such evidence. The learned counsel of the appellant has expressed, in his brief, the true principle as follows: "As to the question of parol evidence, the rule of law is that such evidence cannot be admitted to vary the terms of a contract, or to show contrary intention than that disclosed by the instrument, unless there is an ambiguity." This has been often decided to be the law by this court. Foster v. Clifford, 44 Wis. 569; Cooper v. Clegnorn, 50 Wis. 113, 6 N. W. Rep. 491; Hubbard v. Marshall, 50 Wis. 322, 6 N. W. Rep. 497; Gillmann v, Henry, 53 Wis. 470, 10 N. W. Rep. 692.

There appears to be an inconsistency in cases where it is first held that such a note *ipso facto* binds the person who signed it with his official name, and yet that parol evidence might be given to make it certain. Heffner v. Brownell, 70 Iowa, 591, 31 N. W. Rep. 947. This case is mentioned as the only one in which it has been decided that such signing binds the person as well as the corporation; but there would seem to be somewhat of an ambiguity in the opinion. In Bean v. Mining Co., 66 Cal, 451, 6 Pac. Rep. 86, it seems to have been decided that a similar note bound the company alone, but that parol evidence was proper to explain it. No case is cited, and I can find none, where it has been decided squarely that such a note bound both the company and the person whose name appears below, with the name of his office or agency, or bound the company alone, except the case of Chase v. Pattberg, 12 Daly, 171, where the note was: "We promise to pay" etc. "[Signed] English S. M. Co. H. Pattberg, Manager;" and it was decided that the company was not bound, and that Pattberg was. The authorities are generally the other way. In Draper v. Steam-Heating Co., 5 Allen, 338 the note was: "We promise to pay," etc. "[Signed] Massachusetts Steam-Heating Company, L. S. Fuller, Treasurer." In Castle v. Foundry Co., 72 Me. 167, it was: "We promise to pay," etc., "at office Belfast Foundry Company. [Signed] Belfast Foundry Company. W. W. Castle, President." In Falk v. Moebs, 8 Sup. Ct. Rep. 1319, it was: "We promise to pay," etc., "to the order of Geo. Moebs, Secretary and Treasurer, at," etc. "[Signed] Peninsular Cigar Co. Geo. Moebs, Secretary and Treasurer," and indorsed "Geo. Moebs, Secretary and Treasurer." These notes were held to be unambiguous, and not explainable by parol evidence, and the notes of the companies alone. Many other cases of similar signing are found in the above cases and in the textbooks. See, also, Mechem, Ag. § 449; 1 Rand. Com. Paper, 188; 1 Daniel, Neg. Inst. §§ 299-305; Gillet v. Bank, 7 Ill. App. 499; Scanlan v. Keith, 102 Ill. 634; Lathan v. Flour-Mills, 3 S. W. Rep. 462; Story, Ag. § 154; Pars. Notes & B. 312. The question comes very near, if not quite, having been decided by this court in Houghton v. Bank, 26 Wis. 663, where it is held that an indorsement on a note not belonging to the bank, by "Geo. Buckley, Cas.," he being cashier of the bank, bound the bank and not himself. In Bank v. Bank, 16 Wis. 120, it is held that a note signed by "S. H. Sidmore Cash.," bound the bank alone. In Rockwell v. Bank, 13 Wis. 653, where the bank promises to pay in the body of the note, and it is signed only by "D. D. Spencer, Cashier," it was held that the bank only was bound.

The principle of these authorities seems to be "that if the agent sign the note with his own name alone, and there is nothing on the face of the note to show that he was acting as agent, he will be personally liable; but if his agency appears with his signature, then his principal only is bound." Here the corporation could not sign its own name, and it is not otherwise shown on the face of the note than that Kraus signed the corporate name, and by adding the word "president" to his own name he shows conclusively that as president of the corporation he signed the note, and not otherwise. Such is the natural and reasonable construction of these signatures, and so it would be generally understood. The affix, cashier, secretary, president, or agent, to the name of the person sufficiently indicates and shows that such person signed the bank or corporate name, and in that character and capacity alone. The use of the word "by" or "per" or "pro" would not add to the certainty of what is thus

expressed. It is not common to use these words in commercial business. It is sufficiently understood that the paper is signed by the officer or agent named, and for the corporation. But it is useless to prolong this discussion. It is almost too plain for argument. The note was that of the corporation alone, signed by Kraus as its president. The circuit court properly rejected the offer of parol proof, and correctly instructed the jury to find a verdict in favor of Kraus. The judgment of the circuit court is affirmed.

NOTE—As said in another case, "in all this vast conflict—we had almost said anarchy—of the authorities bearing on the question under consideration, it is not easy to lay down any general rule on the subject, which would be in harmony with all of them."[1] In the case of deeds and sealed instruments, the instrument, except in cases of public agency, must be executed in the name of the principal, and his name alone should appear in the body of the instrument; otherwise, if it be not void, it will bind the party who signs and seals it, even though made on behalf of the principal, and the term agent or the like will be deemed mere *descriptio personae*.[2]

In the case of unsealed instruments, and especially in cases of bills and notes, the rule is applied with less strictness. Though the rule is, that parol testimony is not admissible to vary written contracts, yet it is admitted, where it is doubtful whether in signing a note the agent intended to bind himself or his principal. The reason assigned in some cases is, that the contract is ambiguous,[3] in other cases the ambiguity is considered to be latent:[4] again, since the authority of general agents is often by parol, parol testimony is admissible to ascertain whether the act was done in the exercise of the agency, and whether it was within the limits of the power given;[5] again, parol testimony may prove attendant facts.[6] The general rule seems to be, that where anything appears on the face of the paper to suggest a doubt as to the party bound, or the character in which any of the signers acted in affixing his name, parol testimony is admissible as between the original parties to show the true intent and meaning of the parties. Where nothing indicated that the maker was acting as agent for another, except "treas." after his name, such evidence was admitted to show that it was the note of the corporation.[7] This, however, is not in accordance with the current of authorities. They hold that such addition to the name is merely *descriptio personae*. Where the maker added "president" to his name, the note was held to be his individual note;[8] yet the same court held that a note, signed A., prest. of Pac. Peat. Co., and B., sec. *pro tem.*, was the note of the company.[9] Where the makers added after their names "trustees of First Universalist Church of Princeton," they were individually bound.[10] Where the makers added to their names "trustees Owego Lodge," the note was considered to be individual.[11] Where the makers added to their respective names pres., sec. and treas., the note was considered to be their individual note, even though in the body thereof the consideration therefor was declared to be a policy of insurance which belonged to the company. The court said, that persons often give notes for considerations moving to others.[12] Where, as in the principal case, the note is signed with the name of the corporation, followed by the name of the officer with his office, the authorities generally hold that the corporation alone is bound.[13] In one case it was said, that in such cases the courts always seize hold of all signs on the notes to determine the maker.[14] On the other hand, where a note was signed with the name of the corporation, followed by, A. president, and B. secretary, it was held that there was no ambiguity, that parol evidence was inadmissible, and that the three were joint makers of the note.[15] Where a note is made to the cashier of a bank, or indorsed by him, the appearance of his name with his title thereon is considered to be the act of the bank,[16] and this rule has been extended to the treasurers of corporations and their agents in some cases.[17] Where the owner of the note has sued and obtained judgment against one of the parties as the maker, he will be estopped from subsequently suing another party as the maker. The courts will adopt his conclusion as to the liability on the note.[18] A note was drawn payable to "Geo. Moebs, Sec. and Treas.," was signed "Peninsular Cigar Co., Geo. Moebs, Sec. and Treas," and was indorsed "Geo. Moebs, Sec. and Treas." It was held that the note was drawn by, payable to, and indorsed by the corporation.[19] In this confusion of decisions the better rule to adopt would be, as has been suggested,[20] that whenever the face of the note shows that the signer thereof holds the position of agent or trustee for another, parol evidence should be admissible to show in what capacity he acted in signing the note.

S. S. MERRILL.

1 Falk v. Moebs, 127 U. S. 597.
2 16 Cent. L. J. 342.
3 Hubbard v. Marshall, 50 Wis. 322.
4 Musser v. Johnson, 42 Mo. 74.
5 Mechanics' Bank v. Bk. of Columbia, 5 Wheat. 326.
6 Scanlan v. Keith, 102 Ill. 634.
7 Martin v. Smith, 65 Miss. 1.
8 Hobson v. Hassett, 76 Cal. 203.
9 Farmers' and M. Bank v. Colby, 64 Cal. 352.
10 Hays v. Crutcher, 54 Ind. 260.
11 Coburn v. Owego Lodge, 71 Iowa, 581.
12 American I. Co. v. Stratton, 59 Iowa, 696.
13 Draper v. Steam Heating Co., 5 Allen, 338; Castle v. Foundry Co., 72 Me. 167; Latham v. Houston Flour Mills, 68 Tex. 127; Bean v. Pioneer M. Co., 66 Cal. 451; Scanlan v. Keith, 102 Ill. 634.
14 Carpenter v. Farnsworth, 106 Mass. 561.
15 Heffner v. Brownell, 70 Iowa, 591; s. c., 75 Iowa, 341.
16 16 Cent. L. J. 343; Houghton v. First N. Bank, 26 Wis. 663.
17 Vater v. Lewis, 86 Ind. 288; Societe v. Mackintosh (Utah, 1888), 18 Pac. Rep. 363; Martin v. Lamb, 77 Ga. 252.
18 Scanlan v. Keith, 102 Ill. 634; Almen v. Hardin, 60 Ind. 119.
19 Falk v. Moebs, 127 U. S. 597.
20 Sayre v. Nichols, 7 Cal. 535.

CONDITION OF THE UNITED STATES SUPREME COURT DOCKET.

To the President of the United States:

At the annual meeting of the American Bar Association, held at the City of Chicago on the 28th, 29th and 30th of August, 1889, the undersigned were appointed a special committee of that body, with instructions

"To urge upon congress the passage of a proper act, of the character of that approved by this association at its annual meeting in 1882, for the relief of the Supreme Court of the United States from the accumulation of the business upon its docket."

As the first step towards performing that duty the undersigned would respectfully submit to the president that the urgent necessity of such legislation is a subject to which the attention of congress may be appropriately called by the executive.

That such urgent necessity exists; that the volume and burden of business cast upon the justices of the suprema court has for years past exceeded and now greatly exceeds the utmost limits of their possible labors, and that this has caused an accumulation of cases upon the docket of that court which unavoidably results in a delay in finally disposing of them, in many cases equivalent to an absolute denial of justice,—are facts unfortunately but too familiar to the members of the legal profession and to the country at large.

The records of that court best disclose the actual situation—past and present.

During the first twenty years after its organization in 1790, the average annual number of cases pending was less than one hundred, and never exceeded one hundred and fifty till after 1843.

During the twenty years from 1862 to 1882, the number of cases docketed, at the beginning of each term, increased from less than three hundred and fifty to more than one thousand, notwithstanding the act of February 16, 1875, raised the *minimum* limit of appeal from $2,000 to $5,000.

At the close of the October Term, 1885 nine hundred and four cases remained on the docket undisposed of. By cases docketed during October Term, 1886, this number rose to 1,403, of which 455 in all were disposed of during that term; leaving 948 cases undisposed of at the close of October Term, 1886, or a net increase of 44 cases.

At the beginning of October Term, 1887, the number of cases docketed had risen to 1,044, increased during that term to 1,437. Of these 422 in all were disposed of, leaving 1,015 undisposed of at the close of October Term, 1887, or a further net increase of 67 cases during that term.

At the beginning of October Term, 1888, the number of cases docketed was 1,140, increased during that term to 1,563. Of these 417 were disposed of, leaving 1,146 cases undecided at the close of October Term, 1888, or a further net increase of 131 cases during that term.

At the beginning of the current October Term, 1889, the number of cases docketed was 1,248, since increased to 1,494; being a net increase of 300 cases since the close of October Term, 1886, or less than three years.

It unavoidably results from this that the average delay between the perfecting of an appeal in the circuit court and the hearing of the cause in the supreme court, is now nearly four years. At the present rate of accumulation, this period of delay and suspense is steadily lengthening at the rate of about one year more in every five.

It is obvious that such a situation is not consonant either with the constitutional right of suitors to speedy as well as impartial hearing, or with the proper efficiency and dignity of the supreme tribunal of the nation. The fault is not with the court or its members, but with a system under which their unremitting labors must inevitably fail to accomplish an impossible task.

Experience has shown that between four hundred and five hundred cases in each year is the utmost that a court of nine justices can properly dispose of including those dismissed, or settled by the parties; also, that to increase that number of judges would not add to but rather diminish the efficiency of the court in that regard.

The problem then is to select the four or five hundred cases; to winnow from the mass of appeals those which may, from those which may not, be carried to the highest court in the country; those which require settlement by the supreme judicial authority from those which may be fitly settled by inferior jurisdiction.

But this problem can only be solved by wise and effective legislation, and no legislation would be either wise and effective which did not take into account the necessary limits of the work that the Supreme Court can do.

Repeated efforts have been made, especially during the past ten or twelve years, both in and out of congress, to provide the relief urgently needed both by the supreme and the inferior federal courts, but hitherto without result in legislation.

Of the different plans proposed in the various bills introduced at successive sessions of congress that general plan which contemplates the creation of intermediate appellate courts has been approved by the American Bar Association, as promising the largest measure of relief for all the United States courts. At its annual meeting in 1882, after very full and earnest debate, the association adopted the majority report, to that effect, of a select committee which had given to the whole subject the most careful consideration.

Without further details the undersigned respectfully submit to the president, together with this communication, a copy of that report, as indicating the general plan or scheme for the relief as well of the supreme court as of the inferior courts of the United States, which they are instructed to urge upon congress; and to which, they respectfully submit, the attention of congress may appropriately be called by the executive.

DAVID DUDLEY FIELD, Chairman,
HENRY HITCHCOCK, President of American Bar Ass'n.,
EDWARD OTIS HINKLEY, Secretary of American Bar Ass'n.
WILLIAM ALLEN BUTLER,
J. RANDOLPH TUCKER,
WALTER B. HILL,
J. HUBLEY ASHTON,
THOMAS J. SEMMES,
FRANCIS RAWLE,
GEORGE H. BATES,

RECENT PUBLICATIONS.

NOTES ON THE REVISED STATUTES of the United States and the subsequent legislation of Congress. By John M. Gould and Geo. F. Tucker. Little Brown & Co. Boston, Mass.

The profession, or at least that portion who practice in the United States courts or in the executive departments of the government, will heartily welcome this book, the first of its kind. The aim, as declared by the preface, has been to show all changes made by the revision of 1874 in the previous laws and all statutory changes and additions since made, down to and including the legislation of the fiftieth congress, together with the result of all material decisions of the federal and State courts relating to the constitutionality, repeal, modification and constitution of these,

the supreme law of the land. The work is arranged and sections numbered in same order of subjects as in the edition of the revised statutes, thus rendering it an easy matter for the investigator to learn of any changes in or addition to the law or cases decided upon the subject of each section, of the revised statutes. The authors have collected and arranged thirty thousand cases, which in itself shows the amount of labor and time, expended in its execution. The book bears evidence, and the reputation of the authors is a guarantee of accuracy and thoroughness in its preparation. The work is a large royal octavo volume of nearly eleven hundred pages and in point of mechanical execution is first class.

THE AUSTRALIAN BALLOT SYSTEM, as Embodied in the legislation of various countries with an Historical Introduction, and an appendix of decisions since 1856 in Great Britian, Ireland, Canada and Australia. By John H. Wigmore of the Boston Bar. Second Edition Revised and Enlarged. Boston: The Boston Book Company. Oct. 1889.

When the first edition of this book made its appearance a few months ago we gave an extended review of its contents and, therefore, nothing more need be said about this edition except that its new features are: 1. A detailed account of the movement in almost every State and territory since January, 1889. 2. A summary of the legislation of 1889. 3. An appendix containing a collection of decisions since 1856 interpreting the ballot acts of Great Britain, Ireland, Canada and Australia. 4. Other appendices, containing estimates of speed of voting and expense under the Australian system, suggestions as to ballot leagues, an account of the Rhines Voting Machine, etc.

The remarkable growth and expansion of the system in this country and the many questions which its novelty suggests, renders such a book as this of great value to the legislator as well as the lawyer.

BOOKS RECEIVED.

QUESTIONS AND ANSWERS to Anson on Contracts, including an Analysis of Each Division of the Law of Contracts. By James R. Jordan (Librarian of the Law School of the Cincinnati College). W. H. Anderson & Co., Law Publishers. Cincinnati: 1890.

THE PROVINCES OF THE WRITTEN AND THE UNWRITTEN LAW. An Address delivered at the Annual Meeting of the Virginia Bar Association at White Sulphur Springs, July 25, 1889. By James C. Carter, L. L. D. New York: Banks Bros., Law Publishers. 1889.

A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES, by Jairus Ware Perry. Fourth Edition, embodying relevant cases down to date. By Frank Parsons. In two Volumes. Boston: Little, Brown & Co. 1889.

THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES. By Dr. H. Von Holst, Professor at the University of Freiburg. Translated from the German by John J. Lalor, 1856—1859. Buchanan's Election—End of 35th Congress. Chicago: Callaghan & Company. 1889.

A TREATISE ON THE LAW OF COMMERCIAL PAPER, including all Species of Instruments of Indebtedness, whether Negotiable or Assignable, which are used in the Commerce of the World. By Christopher G. Tiedeman, A. M., L. L. D., Professor of Law in the University of Missouri, and author of "The Law of Real Property," "Limitations of Police Power." St. Louis: The F. H. Thomas Law Book Co. 1889.

QUERIES AND ANSWERS.

[*Subscribers are invited to send short answers to the following.*]

QUERY NO. 21.

A, an insolvent, among other debts, owes B $1,000, to secure which B holds a mortgage on $1,500 worth of land of A's. Other creditors sue A and, pending the suit, A conveys to B by warranty deed absolute on its face the land on which B has his mortgage in satisfaction of B's mortgage debt. But contemporaneous with this transfer, B executes a separate contract of defeasance, by which A is allowed 3 years to redeem the land, this contract being kept secret and B otherwise fully participates in A's purpose to cover up from A's other creditors. In an attack by other creditors to set aside the warranty deed from A to B as fraudulent, will B necessarily lose his *bona fide* debt of $1,000? Cite authorities. H.

QUERY NO. 22.

A loans a banker the sum of $20,000 for one year at 10 per cent. per annum, interest to be paid in advance, which was done. Four months after the loan was made banker failed and assigned. A had the loan secured by collateral security which he had in his possession. Seven months after the loan had been made the assignee made tender of the amount loaned by A, and asked for a rebate of interest which A refused to grant, so the assignee paid the amount of the loan and took up the securities. Now, the assignee brings suit against A to recover what he claims as unearned interest — that is, he wants A to refund five months' interest. Is A liable or not? And please quote authorities. P. W. C.

QUERY NO. 23.

A and B were married by a justice of the peace of a county adjoining that in which the female resided, without any publication of bans and without having procured a license, but with full knowledge of the law. § 6389 of the Rev. Stat. of Ohio reads: "Previous to persons being joined in marriage, notice thereof shall be pulished (in the presence of the congregation), on two different days of public worship; the first publication to be at least ten days previous to such marriage, within the county where the female resides; or, a license shall be obtained for that purpose from the probate judge in the county where the female may reside." The parties are of legal age and have cohabited since marriage. The marriage has not been made public. Is the marriage valid?

HUMORS OF THE LAW.

"I WISH you would pay a little attention to what I am saying, sir," roared a lawyer to an exasperating witness.

"I am paying as little attention as I can," was the calm reply.

MAGISTRASE (to prisoner). Were you born in Pennsylvania?

Prisoner. Yes, sir.

Magistrate. Brought up in this State?

Prisoner. Yes; I have been brought up in Pennsylvania, and every other State in the Union too.

MAGISTRATE (to elderly witness). Your age, madam?

Witness. Thirty.

Magistrate. Thirty what?

Witness. Years.

Magistrate. Thanks. I thought it might be months.

XUM

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ADMIRALITY — Maritime Liens. — Where money necessary to a boat is borrowed by her master in a foreign port, where the credit of her owners alone is not sufficient to obtain such money, the lenders have a lien on the boat therefor, whether the claims against the boat paid by such money constitute liens or not.—*Nippert v. The Williams*, U. S. D. C. (Ky.), 29 Fed. Rep. 823.

2. ADMIRALTY — Jurisdiction. — The United States courts, as courts of admiralty, have jurisdiction of all cases of admiralty cognizance when the thing or parties are within the reach of their process, without reference to the nationality of either.—*The City of Carlisle*, U. S. D. C. (Oreg.), 29 Fed. Rep. 807.

3. APPEAL—New Trial.—When a judgment of the supreme court reverses a judgment of the court below as to all the parties against whom the judgment was rendered, and directs a new trial as to the whole case, the new trial operates on all the parties to the record, and the decision of the supreme court that the complaint stated a good cause of action against all the defendants remains the law of the case through all its subsequent stages.—*Mason v. Burk*, Ind., 22 N. E. Rep. 119.

4. ATTACHMENT. — Where the defendants in attachment set up a claim for damages by reason of the attachment, it may be shown that some of the atttached property, which was a retail hardware stock, was salable only at a certain season, and that, having been held through the season under the attachment, it would have to be carried in stock until the next year.—*Knapp & Spaulding Co. v. Barnard*, Iowa, 43 N. W. Rep. 197.

5. ATTACHMENT—Residence.— Where it appears that defendant in attachment has been a resident of the state 1 years, and has not been out of the same for 9 years, an instruction upon the question of his nonresidence, which was one of the alleged grounds for attachment is reversible error.—*Mann v. Taylor*, Iowa, 43 N. W. Rep. 220.

6. CARRIER—Goods.—Delivery of goods to a common carrier for transportation, whether actual or constructive, being a bailment, involves exclusive possession in the carrier, and this involves a surrender of custody and control for the time being by the consignor.—*Wilson v. Atlanta & C. Ry. Co.*, Ga., 9 S. E. Rep. 1076.

7. CONSTITUTIONAL LAW.—Act Tex. April 3, 1879, authorizing municipal corporations to take control of the public schools within their respective limits, and to levy a tax to support the schools as free schools, is not unconstitutional.—*Werner v. City of Galveston*, Tex., 12 S. W. Rep. 159.

8. CONSTITUTIONAL LAW—Taxation.—Act Tenn. March 29, 1887, imposing a license tax upon express companies, is unconstitutional, as invading the exclusive power of congress to regulate interstate commerce, as against an express company engaged in interstate transportation.—*United States Exp. Co. v. Allen*, U. S. C. C. (Tenn.), 39 Fed. Rep. 713.

9. CONTRACT— Public Policy. — A contract by a board of supervisors with one who is county treasurer whereby he is to collect all delinquent personal property taxes, and receive as compensation therefor a certain per cent. of the interest and penalties on such taxes, is against public policy, and void.—*Adams County v. Hunter*, Iowa, 43 N. W. Rep. 208.

10. CONTRACTS—Grain Options.—Evidence offered on the part of the defendant that they were unable to pay for grain and pork purchased; that they were not the owners of elevators or other means of receiving or storing grain in Nebraska; and that they did not own or have possession of any grain, and particularly of the grain sold, at the time they ordered the plaintiffs to sell grain, testified to,—*held* properly admitted, in connection with evidence that such facts were known to the plaintiffs at the time.—*Wyatt v. Wickersham*, Neb., 43 N. W. Rep. 259.

11. CONTRACTS— Parol Evidence. —A proposition by complainants to the school board of a city, that if a certain text-books should be adopted by the latter complainants would furnish them on certain terms, and a resolution of acceptance of such proposition by the board, neither of which stipulates for any length of time for which the books shall be used, creates a contract free from ambiguity, and evidence *aliunde* is not admissible to show that a certain time was intended.—*Ivison v. Board*, U. S. C. C. (Ind.), 39 Fed. Rep. 735.

12. CONTRACTS— Mutuality. — Where the agents of a corporation, without authority, enter into a contract containing several provisions forming an entirety, the passage of a resolution by the company ratifying the contract except as to one provision is a repudiation of the contract, and releases the other party from all obligations on his part to perform it.—*Crabtree v. St. Paul Opera-House Co.*, U. S. C. C. Minn., 39 Fed. Rep. 746.

13. CORPORATIONS.—A foreign corporation doing business in this State, having no principal office or president or other chief officer resident therein, may be sued in any county wherein it does business, where the cause of action arose out of this State, if process can be legally served in such county.—*Humphreys v. Newport News & M. V. Co.*, W. V. 10 S. E. Rep. 39.

14. CORPORATIONS.—Under Code Civil Proc. Cal. § 388, a bill to enjoin interference by defendants with complainant's alleged right to divert water from a stream, against a corporation, which it appears, is an association formed and existing pursuant to the laws of California, is sufficient, without making the owners and stockholders thereof parties.—*Hewitt v. Storey*, U. S. C. C. (Cal.), 39 Fed. Rep. 719.

15. CORPORATIONS—Charters.—Through the charter of a street-railway company requires it to pave inside of its rails, a subsequent ordinance, passed by the city in pursuance of Acts Gen. Assem, requiring it to pave one foot outside of its rails, is not in violation of the obligation of the contract, assuming plaintiff's charter to have been a contract, as the city did not thereby preclude itself from imposing additional burdens.—*Sioux City St. Ry. Co. v. City*, Iowa, 43 N. W. Rep. 224.

16. CORPORATIONS— Contracts. —A contract executed and sealed in the name of a corporation by its president and secretary, though without the express consent of the directors, is binding on the corporation when it has received benefits under the contracts, and conducted its business in compliance therewith in such a manner that the directors must have known it.—*Jourdan v. Long Island R. Co.*, N. Y., 22 N. E. Rep. 153.

17. COVENANTS RUNNING WITH THE LAND. — Plaintiff entered into a written contract with R to furni-h him water on his land by means of an irrigating ditch, at a stated price, for 40 years. The contract declared that "this agreement and the covenants therein contained on the part of the party of the second part run with and bind the land." The contract was recorded. *Held*

that the clause providing that the contract should run with and bind the land created a lien on the land for its enforcement, and when recorded, was notice to all subsequent purchasers.— *Fresno Canal Co. v. Dunbar*, Cal., 22 Pac. Rep. 275.

18. CREDITORS' BILLS.—The provisions of the Dakota Code of Civil Procedure, regulating proceedings supplementary to executions, do not supersede the remedy afforded by creditors' bills, as a suit in the nature of a creditor's bill may be maintained under the same rules which formerly prevailed in courts of chancery.—*Feldenheimer v. Tressel*, Dak., 43 N. W. Rep. 94.

19. CRIMINAL LAW—Homicide—Charivari.—On a trial for homicide, committed by firing a pistol from the window of a dwelling-house into a *charivari* party assembled about the house after midnight, it is error to direct the jury that such a demonstration would not be sufficient provocation to reduce the killing to manslaughter.—*State v. Adams*, Iowa, 43 N. W. Rep. 194.

20. CRIMINAL LAW—Assault.— An indictment for assault with intent to murder, which alleges that defendant touched one W 'with intent then and there him, and said W, feloniously, willfully, purposely, and with premeditated malice, to kill and murder," sufficiently alleges an intent to commit murder in the first degree. —*State v. Jenkins*, Ind., 22 N. E. Rep. 133.

21. CRIMINAL LAW—Counterfeiting.—Pen. Code Cal. § 480, providing that "every person who makes or knowingly has in his possession," anything employed "in counterfeiting bank-notes or bills, is punishable," applies to foreign as well as domestic bank-notes.—*People v. McDonnell*, Cal., 22 Pac. Rep. 190.

22. CRIMINAL LAW — Gaming. — An information that defendant did "willfully and unlawfully open, carry on, and conduct for money a certain banking game, to wit, a wheel market with numbers and colors, commonly known as a 'Wheel of Fortune,'" etc., charges no offense under said section, or any other, in that it fails to state that the game was "played for money, checks, credit, or any other representative of value."—*People v. Carrol*, Cal., 22 Pac. Rep. 129.

23. DAMAGES — Measure of. — When there has been part performance, and expenditures properly made by one of the parties to a contract, which is broken by the fault of the other party, the party performing may recover his reasonable expenditures. He may also recover the profits of the contract, if he proves that direct, as distinguished from speculative, profits would have been realized.—*Taylor Manuf'g Co. v. Hatcher Manf'g Co.*, U. S. C. C. (Ga.), 39 Fed. Rep. 440.

24. DAMAGES —Measure of.— Where plaintiff agrees to saw certain lumber for defendant, to be used for pump stocks, and saws it so unskillfully that it is not maketable for such purpose, the measure of defendant's damages is the difference between the market value of the lumber as sawed and its value if it had been sawed according to contract.—*Sunman v. Clark*, Ind., 22 N. E. Rep. 113,

25. DECLARATIONS. — The rule that a party cannot prove his own declarations in the absence of the adverse party does not apply to declarations made in the course of a transaction, where the transaction, is itself admissible.—*Walker v. Steele*, Ind., 22 N. E. Rep. 142.

26. DEDICATION—Ways.—Evidence that the owner of land platted it and conveyed the lots with reference to an alley, and that subsequent conveyances of the lots were executed, designating and referring to such alley, is sufficient to show a dedication of the land occupied by the alley, as between subsequent grantees of the lots, whether or not there has been a dedication to public use.—*Wolf v. Brass*, Tex., 12 S. W. Rep. 159.

27. DEED — Construction. — In construing a clause which imports into an instrument a restriction or imposes an obligation not to do something, reliance should be placed upon the known or supposible aim of the grantor, and technical words may be overlooked where they do not inevitably evidence the intention of the parties.—*Post v. Weil*, N. Y., 22 N. E. Rep. 145.

28. DEEDS—Description.— In a conveyance the office of a description is not to identify the land, but to furnish the means of identification; and, when this is done, it is sufficient.—*Works v. State*, Ind., 22 N. E. Rep. 127.

29. DIVORCE—Drunkenness.— Under Civil Code Cal. § 106, providing that habitual intemperance as a ground for divorce shall be such intemperance as "would reasonably inflict a course of great mental anguish upon an innocent party," a complaint in divorce alleging intemperance as a ground, in the language of the statute, is sufficient without alleging the different acts of intoxication, and how the anguish was caused. — *Forney v. Forney*, Cal., 22 Pac. Rep. 294.

30. DOWER—Election.—Testator devised to his wife all his property during his life. She did not claim under will but took actual possession of one third of his land, not knowing that a written election to take under the statute was necessary: *Held*, that the right of election could only be exercised in the manner prescribed by law.—*Foster v. Guilliams*. Ind., 22 N. E. Rep. 118.

31. EMINENT DOMAIN. — The constitutional provision that private property is not to be taken for public purposes without just and adequate compensation being first paid, is too plain to be misunderstood, and is not to be violated or evaded by the legislature or the courts.—*Oliver v. Union Point, etc. R. Co.*, Ga., 9 S. E. Rep. 1086.

32. EVIDENCE— Handwriting. — Evidence tending to prove the signature to a lost deed by its similarity to one alleged to have been affixed by the same person to another deed is not admissible unless the alleged signature has been proved to be genuine. — *Spottiswood Weir*, Cal., 22 Pac. Rep. 289.

33. FALSE REPRESENTATIONS—Sales.—Where the seller makes material statements which are untrue, and the purchaser relies thereon in making the purchase, such representations are fraudulent, and it is immaterial that the seller believed them to be true.—*Kirkpatrick v. Reeves*, Ind., 22 N. E. Rep. 139.

34. FEDERAL OFFENSE—Naturalization.—Rev. St. U. S. § 5424, which makes it an offense for any person applying to become a citizen, or appearing as a witness for such person, to "falsely make, forge, or counterfeit any oath," etc., applies to written oaths, and not to false swearing in open court, in a naturalization proceeding by a witness for the applicant, as the latter offense is punishable exclusively under § 5395.— *United States v. Lehman*, U. S. D. C. (Mo.), 39 Fed. Rep. 768.

35. FIXTURES.—A track scale, used mainly in the business of an elevator, and erected for that purpose, which is closely connected with a hopper, from which grain can be taken by means of conveyors to and from the elevator, and which is joined to the same by a visible frame-work, is a "fixture" to the building. — *McGorrisk v. Dwyer*, Iowa, 43 N. W. Rep. 215.

36. FIXTURES.—A baker's oven, erected by a tenant, which is so attatched to the building that it cannot be severed without destroying its character, reducing it to a mere mass of crude materials, and doing substantial injury to the building, is a permanent attachment to the realty, and is not removable as a trade fixture.—*Collamore v. Gillis*, Mass., 22 N. E. Rep. 46.

37. FRAUDULENT CONVEYANCE. — A conveyance of a homestead, which is not subject to a lien of a judgment, nor to sale under execution, though made with a bad motive, is not fraudulent as to creditors. — *Bogan v. Cleveland*, Ark., 12 S. W. Rep. 159.

38. INSURANCE — Assignment. — On a sale of insured property and an assignment of the policy to the purchaser, duly assented to by the company, a new contract of insurance arises between the company and the assignee, which is not affected by a default of the assignor before the assignment amounting to a forfeiture of the policy. — *Continental Ins. Co. v. Munns*, Ind., 22 N. E. Rep. 78.

39. INSURANCE—Mortgage. — When a mortgagee has stated the nature of his interest to an insurance agent,

has requested a policy insuring that interest, and has accepted a policy drawu up by the agent in favor of the mortgagor, with the belief that it is sufficient, it may be reformed so as to protect the interest of the mortgagee.—*Esch v. Home Ins. Co.*, Iowa, 43 N. W. Rep. 229.

40. INTOXICATING LIQUORS—Indictment. — Under Rev. St. Ind. 1881, § 2097, providing that "whoever keeps a place where intoxicating liquors are sold, bartered, given away, or suffered to be drunk in a disorderly manner, to the anoyance or injury of any part of the citizens of this State, shall be fined," an indictment which describes the offense in the words of the statute is sufficient.—*Skinner v. State*, Ind., 22 N. E. Rep. 115.

41. JUDGMENT—Forfeiture. — After judgment entered against sureties on a bail bond for a forfeiture of the same, their liability upon the judgment is still a forfeiture within the meaning of Const. Iowa, art. 4, § 16, and Code, § 4712, which provide that the governor "shall have the power to remit fines and forfeitures upon such conditions as he may think proper." — *Harbin v. State*, Iowa, 43 N. W. Rep. 210.

42. JURY — Challenges. — The question whether an opinion formed by a juror, from reading evidence upon the trial of another defendant for the same offense, would prevent his rendering a true verdict upon the evidence in the subsequent trial is for the trial court, under § 4409, declaring that "in all challenges the court shall determine the law and the fact;" and in cases of doubt the supreme court will not interfere with its decision.—*State v. Munchrath*, Iowa, 43 N. W. Rep. 211.

43. LIFE INSURANCE—Waiver.—Where a policy of life insurance provides for a forfeiture unless the premiums thereon are paid at maturity, but the insurance company has accepted payment of more than half of such premiums after maturity, without warning of any possible forfeiture in future, if the last premium be paid within the same time after maturity as the majority of the previous ones, the company is estopped from asserting a forfeiture though the insured died before such payment.—*Spoeri v. Massachusetts Mut. Life Ins. Co.*, U. S. C. C. (Mo.), 39 Fed. Rep. 752.

44. MARRIED WOMEN—Separate Estate.— Where debts are contracted by a married woman upon the faith and credit of her separate estate, and charged to her, and not to her husband, her separate estate is liable therefor.—*Geiger v. Blackley*, Va., 10 S. E. Rep. 43.

45. MORTGAGES—Foreclosure. — The plaintiff held a junior mortgage on land, and, in an action to foreclose the senior mortgage, he was made a party defendant for the purpose of foreclosing his lien, but his first name was set out as "Edward," when it was in fact "Edmund." He acknowledged personal service over his proper signature, but the decree was entered against him as "Edward:" *Held*, that the notice was sufficient, and the court had jurisdiction. —*Lindsey v. Delano*, Iowa, 43 N. W. Rep. 218.

46. MUNICIPAL CORPORATIONS.— The provisions of § 86, art. 1 ch. 14, Comp. St., limiting the power of the city council to appropriate money to the annual appropriation bill, and to such sums as in the aggregate shall not exceed the amount of tax authorized to be levied during that year: *Held*, not to apply to money authorized to be borrowed by such city for a specific purpose. —*State v. Martin*, Neb., 43 N. W. Rep. 244.

47. MUNICIPAL CORPORATIONS.— Where the action of a city in executing a public work is within the scope of its authority, and free from fraud and corruption, it will not be enjoined, though the methods adopted result in special damage to complainant. — *Union Steam Boat Co. v. City of Chicago*, U. S. C. C. (Ill.), 39 Fed. Rep. 723.

48. MUNICIPAL CORPORATIONS — Defective Streets. — Though it is the duty of municipal corporations in Arkansas to keep their streets in repair, yet in the absence of a statute, they are not liable to persons injured by failure to repair. — *City of Fort Smith v. York*, Ark., 12 S. W. Rep. 157.

49. MUTUAL BENEFIT INSURANCE.— Where the laws of a mutual association require the payment of all assessments within thirty days after the date of the notice thereof, on penalty of suspension, the time of which is to be fixed by vote of the association, an order of an officer of the association, suspending a member for non-payment of an assessment, but without the required vote, is inoperative.—*Knights of Honor v. Wicker*, Tex., 12 S. W. Rep. 175.

50. MUTUAL BENEFIT INSURANCE.—In an action against a benefit society for sick benfits plaintiff is entitled to recover on a valid claim, though he did not exhaust the remedies known to the society, for the recovery of claims, as required by its laws, before bringing suit, where he is prevented from doing so by the willful refusal of the proper officer to certify to his sickness. — *Supreme Sitting v. Stein*, Ind., 22 N. E. Rep. 136.

51. NEGLIGENCE—Parent and Child.—In an action by a child's administrator for damages for the death of the child, caused by the breaking of a bridge over which the child was riding in a carriage with its parents, who had taken it into the carriage without volition on its part, the negligence of the parents cannot be imputed to the child.—*Wymore v. Mahaska County*, Iowa, 43 N. W. Rep. 264.

52. NEGLIGENCE—Declarations.—The statement of the station agent of a railroad company, made at the time plaintiff received injuries for which he sues, that the hole in the platform into which plaintiff fell "ought to have been fixed," is incompetent to show unreasonable delay on the part of the company in repairing the platform after the defect became known.—*St. Louis, etc. Ry. Co. v. Barger*, Ark., 12 S. W. Rep. 156.

53. NEGLIGENCE.—One who drives a vicious and unmanageable stallion among a crowd of vehicles standing apart from the traveled road at a county fair is liable for injuries caused thereby. — *Clore v. McIntire*, Ind., 22 N. E. Rep. 128.

54. NEGLIGENCE— Defective Bridges. — In an action against a county for an injury alleged to have been caused from a defective bridge, an allegation in the complaint that such bridge was safely used for thirteen years does not overcome the statement that it was negligently constructed of unsafe and unsuitable material.—*Wabash County v. Pearson*, Ind., 22 N. E. Rep. 134.

55. NEGOTIABLE INSTRUMENT. — An agreement by an indorsee of a note releasing a joint maker from liability for the balance upon payment of a part, is without consideration and void.—*Bender v. Been*, Iowa, 43 N. W. Rep 216.

56. NEGOTIABLE INSTRUMENT.—An accommodation indorser of a bill of exchange, meeting the debt when legally charged with its payment, becomes a holder for value of the bill, and may recover thereon against an accommodation acceptor the full amount paid, notwithstanding he knew at the time of indorsement that the acceptance was for accommodation.— *Gillespie v. Campbell*, U. S. C. C. (Ill.), 39 Fed. Rep. 724.

57. NEGOTIABLE INSTRUMENTS. — An instrument in writing in the following form, to-wit: "Marshalltown Ia., July 16 1877. For value received I hereby promise to pay to Peter Housel, or order, $500, with ten per cent. interest per annum, payable semi-annually in advance, and, on default of prompt payment of the interest for thirty days after it is due, then this note principal and interest, shall be due and collectible, without defalcation or discount, together with an attorney fee of ten per cent. for collection:" *Held*, to be a negotiable promissory note, payable on demand.—*Roberts v. Snow*, Neb., 43 N. W. Rep. 241.

58. OFFICE AND OFFICER.—Under Const. Tex. art. 16, §§ 1, 5, which provide that every officer, before assuming the duties of his office, shall take an oath that he has not given or offered any inducement to procure votes at his election, and that every person shall be disqualified from holding office upon conviction for such offense merely holding out a promise, in case of his election, to serve for less compensation than the lawful fees, does not disqualify one from holding office, unless he had

been actually convicted for such offense. — *State v. Humphreys*, Tex., 12 S. W. Rep. 99.

59. OFFICER—Bond.—In an action against a city clerk, and his bondsmen, to recover money received by him as clerk, defendants are estopped to deny the validity of the ordinances under which the money was received, which were in existence when the bond was executed.—*Middleton v. State*, Ind., 22 N. E. Rep. 123.

60. PARTIES.—In a suit for the proceeds of a note, alleged to have been disposed of by one of the defendants in violation of a contract, by which he had agreed to hold it "subject to the joint order and direction" of the named attorneys of the adverse claimants of the note, the contract having been made on abandonment of an arbitrator's award respecting the ownership of the note, such adverse claimants, and their respective attorneys, are necessary parties. — *Gregory v. Swift*, U. S. C. C. (Mass.), 39 Fed. Rep. 708.

61. PAYMENT — Tender. — An offer of payment of a coupon bond, with interest to date, in pursuance of a right reserved, is a valid tender, and will stop the running of interest on the bond, though a condition annexed to the offer was the surrender of the bond and all its coupons then in the hands of its holders.— *Bailey v. Buchanan County*, N. Y., 22 N. E. Rep. 155.

62. POOR AND POOR-LAWS.— The several townships of a county, organized under the township system of government, are charged by law with the care, support, and maintenance of paupers residing and legally settled therein respectively.— *Waltham v. Town of Mullelly*, Neb., 43 N. W. Rep. 252.

63. PRACTICE—Attachment.— Under Code Civil Proc. Cal. § 559, requiring the officer serving a writ of attachment to return the same, "with a certificate of his proceedings indorsed thereon or attached thereto," when the return asserts that he attached certain property, but fails to set out the performance of all the necessary acts, parol evidence is admissible to prove their performance.—*Bruise v. Gates*, Cal., 22 Pac. Rep. 284.

64. PRACTICE—Civil Cases.—Though Rev. St. Ind. § 551, does not designate the time when a request for special findings by the court must be made, one made after the evidence had been partly heard comes too late.— *Hartlepp v. Cole*, Ind., 22 N. E. Rep. 130.

65. PRACTICE— Dismissal. — Upon final submission of the cause it was error to permit the plaintiff to reserve the right to dismiss without prejudice in the event the court decided against him.—*McAurthur v. Schultz*, Iowa, 43 N. W. Rep. 223.

66. PROBATE COURT—Jurisdiction.—The judgment of a probate court against a guardian for goods furnished to the mother of his wards for their benefit is void, and will be set aside on *certiorari*.—*Creswell v. Mathews*, Ark., 12 S. W. Rep. 158.

67. RAILROAD COMPANY—Negligence. — One who is injured a half mile distant from a crossing cannot assign the violation of Rev. St. Mo. § 806, requiring the ringing of bells and sounding of whistles at railroad crossings, as the proximate cause of his injury. — *Pike v. Chicago, etc. R. Co.*, U. S. C. C. (Mo.), 39 Fed. Rep. 754.

68. RAILROAD COMPANY—Damage. — The constitution of Georgia adopted in 1877 provides that private property shall not be taken or damaged for public use without just compensation: *Held*, that the owner of property which is damaged by the construction or operation of a street railway has a right of recovery though his property is not taken. — *Campbell v. Metropolitan St. R. Co.*, Ga., 9 S. E. Rep. 1078.

69. REMOVAL OF CAUSES.— *Held*, under the facts that the petition disclosed but a single cause of action against both defendants, and that the cause was not removable on the ground of a separable controversy. — *Sexton v. Seelye*, U. S. C. C. (Mo.), 39 Fed. Rep. 705.

70. RES ADJUDICATA — Quieting Title. — A grantee who is not made a party, is not bound by the judgment rendered in an action to quiet the title to the land, brought against the grantor after the conveyance was made.—*Chase v. Kaynor*, Iowa, 43 N. W. Rep. 269.

71. RES JUDICATA.—A decree in foreclosure against the mortgagor, which is silent as against defendants who had previously purchased and converted the mortgaged property, is a bar to a subsequent action against them for the conversion.—*Kenyon v. Wilson*, Iowa, 43 N. W. Rep. 227.

72. SALE—Warranty.—After a scale has been set up and tested, the giving of a note therefor, though not required by the contract of sale, is not a waiver of a warranty of the scale, in the absence of anything to show the conclusiveness of the test, or any intent to waive such warranty.—*Toledo Sav. Bank v. Rathmann*, Iowa, 43 N. W. Rep. 193.

73. SALE—Warranty.—On a sale of goods described as of a specified quality, which is well known in the market as distinct from an inferior grade, a warranty is implied that the goods shall be of that grade, though the contract of sale further specifies that the goods are sold "as per sample," and such warranty is broken if the goods are not of the specified quality, though they may be equal to the samples shown.—*Gould v. Stien*, Mass., 22 N. E. Rep. 47.

74. SPECIFIC PERFORMANCE.— Defendant W purchased land from defendant vendor, and paid part of the price and gave a note and mortgage for the balance before he had notice, express or implied, of complainant's claim under a former contract with the vendor. Action for specific performance was begun after the delivery of the deed to W., but before it was recorded, *Held*, that the decree in favor of W was proper.—*Walker v. Cameron*, Iowa, 43 N. W. Rep. 199.

75. TAXATION—Leaseholds.—Under Rev. St. Tex. art. 4691, water-works leased for a term of 25 years from a city cannot be assessed against the lessee at the value of the land, but only at the value of the leasehold, if at all.—*State v. Taylor*, Tex. 12 S. W. Rep. 176.

76. TAX—Deed.—The tax-deed was executed in 1871, and the land was unoccupied till 1878, when defendant took possession under the tax-deed. The action to quiet title was brought in 1885. *Held*, that plaintiff's right of action was not barred by 10 years' adverse possession, as the possession was presumptively in the holder of the legal title prior to 1878. — *Burke v. Butler*, Iowa, 43 N. W. Rep. 204.

77. TAX-TITLES—Limitation.— An action to foreclose a tax-sale on real estate may be brought on a tax certificate when it is alleged in the petition that a deed would be invalid if issued. In such case a cause of action would accrue at the expiration of the time within which the land-owner might redeem, and suit might be brought at any time within five years thereafter.—*Shepherd v. Burr*, Neb., 43 N. W. Rep. 256.

78. VENDOR AND VENDEE.—Whatever may be the effect of an instrument purporting to convey property consisting of the road-bed, etc., of a railroad, where the grantor receives a consideration and abandons the property of which the grantee takes possession, enters into a new contract with the parties to whom the grantee's title is forfeitable, and completes the road, the title no longer remains in the grantor.—*Schlesinger v. Kansas City, & S. Ry. Co.*, U. S. C. C. (Mo.), 39 Fed. Rep. 741.

79. VENDOR AND VENDEE—Notice.— The purchaser of real estate takes the same charged with notice of the equities of the parties in possession at the time of the purchase.—*Lindley v. Martindale*, Iowa, 43 N. W. Rep. 233.

80. WILLS — Construction. — Testatrix, after making special bequest, added: "I give, devise, and bequeath unto my beloved husband, B, all the real and residue of both my real and personal estate, of every name and nature whatsoever; and whatever of the same should be left at his decease I direct should be equally divided between the children of the said B and their heirs and assigns forever." *Held*, that B took an absolute devise, without limitation, and not a life-estate only.—*Halladay v. Stickler*, Iowa, 43 N. W. Rep. 228.